

February 16, 2007

Writer's Direct Contact
415.268.7246
Telefacsimile: 415.276.7535
CCarr@mofo.com

**Via Electronic Mail (gchilds@waterboards.ca.gov)
and Regular Mail**

Guy Childs
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670-6114

**Re: Draft Cease and Desist Order and Connection Restriction for City of Lakeport
Municipal Sewer District Wastewater Treatment Facility, Lake County**

Dear Mr. Childs:

This firm represents Schellinger Homes ("Schellinger") with respect to the above-referenced matter. On behalf of Schellinger, we appreciate this opportunity to comment and submit proposed testimony on the Draft Cease and Desist Order and Connection Restriction for City of Lakeport Municipal Sewer District Wastewater Treatment Facility ("Draft Order"). We understand the Central Valley Regional Water Quality Control Board ("Water Board") will consider the Draft Order at its March 15-16, 2007, meeting.

As background, Schellinger Homes is the developer of 95-unit single-family residential project known as Parkside in Lakeport, California. The project, adjacent to Westside Community Park and located on 20 acres of land, was approved by the City of Lakeport in 2006. Thus far, Schellinger has received four building permits to build model homes for the development.

Schellinger respectfully submits that the Draft Order is legally and technically flawed.

While California Water Code section 13301 provides that in "the event of an existing or threatened violation of a waste discharge requirement in the operation of a community sewer system, a cease and desist order may restrict or prohibit the volume, type or concentration of waste that might be added to the system," the Water Board may only take such action if consistent with its police powers to take such measures necessary to protect the order, safety, health, morals and general welfare of society. For this reason, a cease and desist order can only prohibit "connection[s] that might constitute a menace to health or otherwise threaten to

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degrade the environment shared by the community as a whole.” *Morshead v. Cal. Reg’l Water Quality Control Bd.*, 45 Cal. App. 3d 442, 449-50 (1975).

Here, the prohibition goes beyond what is necessary to protect the environmental health of the community. A prohibition on new sewer connections may make sense when the cause of the alleged violation is the overloading of the system. *See, e.g., id.* at 446 (concluding a cease and desist order prohibiting new connections was proper “on the basis [that] corrective measures taken by the district [were needed] to reduce the overloading of their facilities”). However, the Draft Order does not say this. Rather, the Draft Order states that the “currently permitted” flow rate is 1.05 mgd. Draft Order at 2. The Draft Order goes on to note that from May to September 2006, the average dry weather flow ranged from 0.38 to 0.64 mgd. *Id.* These amounts fall well within the currently permitted flow rate. *Id.*

The Draft Order does not claim otherwise, but instead states that as of September 2006, “there is adequate storage capacity for an average dry weather flow of 0.57 mgd.” *Id.* However, even using this balance capacity, it is not clear that the current flow amounts exceed capacity. As stated above, the Draft Order concludes that from May to September 2006, the average dry weather flow ranged from 0.38 to 0.64 mgd. This is a wide range and the Draft Orders fails to explain when the alleged 0.64 mgd flow measure occurred or how often the average flow exceeded the 0.57 mgd that the system allegedly has capacity to store.

Moreover, the Draft Order fails to draw any connection between this alleged capacity issue and any alleged unlawful spill or discharge. None of the alleged spills appears to be connected in anyway to an incident when storage capacity was exceeded. As explained in the enclosed proposed testimony of Ken Walters, all of the violations cited in the Draft Order can be attributed to the maintenance of the old collection system, lack of advanced planning and unusual weather conditions; not one had to do with plant capacity. Indeed, over the past six years, only one violation occurred at the treatment plant and that could be attributed to open cleanouts. As a result, it does not appear that the connections prohibition is necessary to reduce the overloading of the system when it cannot even be said that the system was, in fact, overloaded.

Even if the Draft Order could be construed as concluding that overloading the system was the cause of violations of the applicable waste discharge requirements, this conclusion is not supported by substantial evidence. *See Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 393 (1988). To be valid, an agency decision must be based on “enough relevant information and reasonable inferences from the information that a fair argument can be made to support a conclusion.” *Id.* The Draft Order lacks such basis.

As explained below, there is no evidentiary support for concluding that the “current flow rate” is 0.64 mgd, which is the basis for the connections prohibition. Draft Order at 2, 9.

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The Draft Order fails to explain when this measurement was taken or whether other months' flow rates were of similar quantities (this is questionable given that the average dry weather flow ranged from 0.38 mgd to 0.64 mgd). As a result, it is improper for the Draft Order to use this flow rate, without evidentiary support, as a basis for prohibiting all future sewer connections.

Not that there could be substantial evidence to support such a conclusion. As explained in the enclosed proposed testimony by Mr. Walters, the City of Lakeport prepared a report that indicates that the average daily water flow over the past three years was either 0.427 mgd or 0.408 mgd (depending on the method of measurement). The Pace report (which the Draft Order relies upon to conclude the existing capacity is only 0.58 mgd) reaches a similar conclusion, putting the average daily water flow at 0.48 mgd for the past six years. As a result, the existing system has a minimum *unused* capacity of approximately 0.09 mgd. This strongly suggests that not only was the 0.64 mgd used in the Draft Order a complete anomaly and not indicative of the current flow rate for the system, but also shows that a complete prohibition on sewer connections is not supported by the evidence in the record.

Here, the capacity and flow rate analysis prepared by the City of Lakeport and provided to the Water Board demonstrates ample capacity to accommodate additional connections. For example, Schellinger's Parkside project, at total build-out, would add only about 0.02 mgd to the system over the course of the next four years. This would be easily handled under the most conservative estimate of unused capacity of 0.09 mgd. Accordingly, there is no reasonable basis for prohibiting all connections to the system.

Furthermore, the prohibition would actually harm the community at large. The Parkside development is Lakeport's first major subdivision and the Draft Order effectively halts the project, denying new residents homes and the area of significant community amenities. The Draft Order also deals a significant hardship to Schellinger. The Notice and Draft Order prohibits the City of Lakeport from issuing any further building permits for Schellinger's project, depriving Schellinger of its ability to use and develop its property. Schellinger relied upon the existing capacity, as discussed above, in developing the project and expended significant capital to develop and improve the land. This investment is only recoverable if Schellinger is able to build and sell houses.

In sum, the Draft Order is based on misconceptions of the causes of the alleged violations and the existing flow and capacity of the waste water system. There is no reasonable basis for the connections prohibition at this time, when capacity exists to accommodate the Parkside project (and more) Schellinger respectfully request the Draft Order be rescinded. If the Water Board elects to go forward with an order, it should be revised to accurately reflect the evidence in the record, which as explained above, does not support a connections prohibition.

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Scott Schellinger, of Schellinger Brothers, and Kenneth Walters, of KG Walters, would welcome the opportunity to orally summarize this testimony at the March 15-16, 2007, meeting of the Water Board.

Thank you for the opportunity to comment on these issues.

Respectfully submitted,



Christopher J. Carr

Enclosures

Proposed Testimony of Ken Walters

In the Matter of the Draft Cease and Desist Order and Connection Restriction for City of Lakeport Municipal Sewer District Wastewater Treatment Facility, Lake County

February 16, 2007

I, Ken Walters, am a Registered Civil Engineer in California, Nevada, Oregon and Utah, and a Registered Contractor in California, Nevada, Oregon and Idaho. I have expertise and experience in the construction of water and wastewater treatment plants, as well as the analysis of sewer systems and waste water treatment facilities for proposed projects.

The information contained in this report is based on reports prepared by the City of Lakeport, water balance report prepared by PACE Civil, Inc., information received from Schellinger Homes, and other factual data, drawing on my expertise in water and wastewater treatment plants.

Based on this information, the following observations can be drawn:

- The permitted capacity of the existing treatment plant in Lakeport is 1.05 mgd.
- A water balance report prepared by PACE Civil, Inc. indicates an existing capacity of 0.57 mgd.
- The City has prepared a report that indicates the actual ADWF over 3 years of 0.427 mgd or 0.408 mgd (depending on the method of measurement) and the Pace report dated September 15, 2006 shows 0.48 ADWF over the past 6 years.
- The Schellinger Homes Project at total build out will be 96 homes and will add about 0.02 mgd to the system over the next 4 years.

Based on the above, I would conclude that the existing system has a minimum unused capacity of about 0.09 mgd. This will easily handle the 0.02 mgd of the Schellinger development.

All of the violations have nothing to do with the plant capacity, but rather maintenance of an old collection system, advance planning and unusual weather conditions. Over the past six years only one violation occurred at the treatment plant and it can be attributed to open cleanouts.

In conclusion, Schellinger acted prudently in starting their development when the City had a permitted capacity about two times the actual flow, and there is more than adequate capacity remaining to accommodate the Schellinger development.